No. 93-542

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

In the Matter of

PARUL P.,

A Child Under Eighteen Years of Age Alleged to be Abused by RASHMI, P.,

Petitioner,

-against-

COMMISSIONER OF SOCIAL SERVICES,

Respondent.

LAW GUARDIAN'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

LENORE GITTIS MITTELMAN*
KENNETH RABB
Law Guardian for the Child
THE LEGAL AID SOCIETY
Juvenile Rights Division
15 Park Row - 21st Floor
New York, New York 10038
(212) 619-3890

*Counsel of Record

December 8, 1993

BEST AVAILABLE COPY

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Does this Court have jurisdiction to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department if it is not the judgment of the highest state court and if petitioner failed to raise the federal question sought to be reviewed in a timely and proper manner in the courts below.

II. In this civil child protective proceeding under Article 10 of the New York Family Court Act, does the statutory requirement that a finding of abuse be based on a preponderance of the evidence, rather than on clear and convincing evidence, comport with due process, assuming the issue is preserved for review?

III. Did the state courts properly reject petitioner's claim that he was denied a fair trial?

IV. Are the rules applicable to the definiteness of indictments, and under Brady v. Maryland, 373 U.S. 83 (1963), inapplicable to a civil proceeding pursuant to Article 10 of the Family Court Act?

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... ii

STATUTES INVOLVED..... 2

STATEMENT OF THE CASE..... 4

REASONS FOR DENYING THE WRIT..... 4

A. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT BECAUSE IT IS NOT THE JUDGMENT OF THE HIGHEST STATE COURT..... 4

B. PETITIONER FAILED TO CHALLENGE THE EVIDENTIARY STANDARD IN THE COURTS BELOW. IN ANY EVENT, THE STATUTORY REQUIREMENT THAT A FINDING OF ABUSE BE BASED ON A PREPONDERANCE OF THE EVIDENCE FULLY COMPORTS WITH DUE PROCESS..... 7

C. PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL. THERE IS NO BASIS IN LAW OR IN THE RECORD FOR PETITIONER'S MERITLESS CONTENTIONS THAT HIS RIGHTS WERE VIOLATED BECAUSE THE ABUSE PETITION WAS INDEFINITE AS TO WHEN HE ABUSED THE CHILD OR BECAUSE HE WAS DEPRIVED OF REQUIRED DISCOVERY MATERIAL..... 8

CONCLUSION..... 8

TABLE OF AUTHORITIES

CASES — PAGE

Gotthilf v. Sills, 375 U.S. 79 (1963) 5

McMaster v. Gould, 276 U.S. 284 (1928) 5

Southern Electric Co. v. Stoddard, 269 U.S. 186 (1925) 5

STATUTES

28 U.S.C. §1257(a) 5

New York Civil Practice Law and Rules:

§5514 7

§5601 6

§5601(B)(1) 6

§5602 6

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1993

In the Matter of

PARUL P.,

A Child Under Eighteen Years of Age
Alleged to be Abused by RASHMI P.,

Petitioner,

-against-

COMMISSIONER OF SOCIAL SERVICES,

Respondent.

On Petition for a Writ of Certioraria to the New York Supreme Court, Appellate Division, Second Department

---

BRIEF IN OPPOSITION

Repondent, Parul P., hereby submits a brief in opposition to the petition for a writ of certiorari in the above matter, pursuant to Rule 22 of the revised Rules of the Supreme Court of the United States.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the petition on pages 3, 4 and 5. In addition, the following statutes are relevant:

Civil Practice Law and Rules §5514. Extension of time to appeal or to move for permission to appeal.

> (a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

Civil Practice Law and Rules §5601. Appeals to the court of appeals as of right.

> (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
>
> (1) from an order of the appellate division which finally determines an

action where there is directly involved the construction of the constitution of the state or of the United States.

Civil Practice Law and Rules §5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken.

1. in an action originating in the supreme court, county court, a surrogate's court, the family court, the court of claims or an administrative agency or an arbitration.

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right.

STATEMENT OF THE CASE

A full statement of the case is found in the Brief in Opposition of the Respondent Commissioner of Social Services at pages 1-44.

REASONS FOR DENYING THE WRIT

-A-

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT BECAUSE IT IS NOT THE JUDGMENT OF THE HIGHEST STATE COURT.

This Court does not have jurisdiction to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Department. While petitioner sought permission to appeal to the New York State Court of Appeals, he failed to take an appeal as of right to that court. Therefore the judgment sought to be reviewed was not "rendered by the

highest court of a State in which a decision could be had" as required by Section 1257(a) of Title 28 of the United States Code.

This Court has repeatedly held that it lacks jurisdiction of a case where a litigant fails to pursue the correct method of appeal in the state courts. This result obtains even where the litigant has sought state court review by unsuccessful or inappropriate procedures. See e.g., Gotthilf v. Sills, 375 U.S. 79 (1963); McMaster v, Gould, 276 U.S.284 (1928); Southern Electric Co. v. Stoddard, 269 U.S. 186 (1925).

Civil appeals to the New York State Court of Appeals, the State's highest court, are governed by Article 56 of the New York Civil Practice Law and Rules (hereinafter C.P.L.R.). Appeals to the

Court of Appeals may be taken as of right pursuant to C.P.L.R. §5601 as well as by permission pursuant to C.P.L.R. §5602. Petitioner sought and was denied permission to appeal. However, he failed to take an appeal as of right.

Pursuant to C.P.L.R. §5601(b)(1) an appeal may be taken as of right to the New York State Court of Appeals,

> from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or the United States.

Petitioner's claims directly involve the construction of the United States Constitution. By appealing as of right, petitioner would have obtained review of his constitutional claims by the New York Court of Appeals. His failure to do so is fatal to this Court's jurisdiction.

Even after the Court of Appeals

denied permission to appeal, petitioner had thirty days from the date of the order denying permission to appeal to take a timely appeal as of right. C.P.L.R. §5514. He did not.

In sum, petitioner's failure to raise his constitutional claims as of rights in the New York Court of Appeals deprives this Court of jurisdiction. The petition for a writ or certiorari must be denied.

-B-

PETITIONER FAILED TO CHALLENGE THE EVIDENTIARY STANDARD IN THE COURTS BELOW. IN ANY EVENT, THE STATUTORY REQUIREMENT THAT A FINDING OF ABUSE BE BASED ON A PREPONDERANCE OF THE EVIDENCE FULLY COMPORTS WITH DUE PROCESS.

The law guardian adopts the argument found in the Brief in Opposition Respondent of the Commissioner of Social Services at pp. 45-53.

-C-

PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL. THERE IS NO BASIS IN LAW OR THE RECORD FOR PETITIONER'S MERITLESS CONTENTIONS THAT HIS RIGHTS WERE VIOLATED BECAUSE THE ABUSE PETITION WAS INDEFINITE AS TO WHEN HE ABUSED THE CHILD OR BECAUSE HE WAS DEPRIVED OF REQUIRED DISCOVERY MATERIAL.

The law guardian adopts the argument found in the Brief in Opposition of the Respondent Commissioner of Social Services at pp. 54-64.

CONCLUSION

FOR THE ABOVE STATED REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

LENORE GITTIS
KENNETH RABB
Law Guardian for Parul P.

THE LEGAL AID SOCIETY
Juvenile Rights Division
15 Park Row - 21st Floor
New York, New York 10038
(212) 619-3890